Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1049

Roger L. Baker, *et ux.*,

Petitioners,

— v. —

Judge Hollie Pihl,

Respondent.

Robert Briggs in his representative capacity, and
Probate Judge Albert R. Musick,

Respondents.

SUPPLEMENTAL BRIEF FOR PETITIONERS PURSUANT TO RULE 24(5)

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SUPPLEMENTAL BRIEF FOR PETITIONERS PURSUANT TO RULE 24(5)

In our Petition for Certiorari we asked this Court to include the *BAKER v. PIHL* case for review without judgment, under Supreme Court Rule 20, where the court below had failed to take judicial notice, in accordance with Fed Rules of Evid, Rule 201(d). We indicated that we had been notified of a hearing, which was to be held in the court below on *BAKER v. PIHL,* but we would not have been able to delay our Petition on *BAKER v. BRIGGS,* as we had not been notified in time to request an extension of time in which to file this petition.

CITATION TO CASE BELOW

Petitioners received the following memorandum from the court below on January 29, 1977 and it is therefore submitted by this Supplement:

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROGER L. BAKER and EDNA I. BAKER,
Petitioners-Appellants,

vs.

JUDGE HOLLIE PIHL,
Respondent-Appellee.

No. 76-2311

MEMORANDUM

[January 25, 1977]

Appeal from the United States District Court
for the District of Oregon

Before: HUFSTEDLER, SNEED, and KENNEDY,
Circuit Judges.

The district court properly dismissed appellants' civil rights action. Appellee is a probate court judge in Washington County, Oregon. The appellee is immune from suit under 28 U.S.C. § 1983. (*Pierson v. Ray*, 386 U.S. 547 (1967).) Whether or not Judge Pihl was right or wrong in removing Edna I. Baker as the personal representative of the decedent, the judge's action was within the scope of his duties.

AFFIRMED.

QUESTIONS

I PRESENTED BY THE COURT BELOW

The main question this Supplement brings before this Court is:

> whether a state judge is acting within the scope of his duties when he is violating his state's criminal code ?

II AVOIDED BY THE COURT BELOW

1. Does a state judge have immunity in a constitutional action for injunctive relief ?

2. Does the United States District Court below have discretion to dismiss an action without hearing, or finding of fact ?

3. Does the United States Circuit Court of Appeals below have discretion to affirm a finding of fact, when no hearing, or stipulations were had on any facts ?

RELEVANT FACTS

1. The United States District Court for the District of Oregon dismissed the action against judge Pihl without hearing, or finding of fact.

2. Petitioners, in their complaint, accused judge Pihl of having issued a false affidavit.

3. Petitioners supported their accusation of their state's criminal code having been violated, with evidentiary exhibits.

4. Defendant Pihl was never allowed to answer petitioner's accusations.

5. Reliance upon his own false affidavit is a felonious crime of Perjury under Oregon Revised Statute 162.065.

REASONS FOR REVIEW OF ISSUES

I DECISION NOT IN ACCORD WITH OPINIONS OF THIS COURT

Petitioners submit that the above quoted memorandum is a prime example of an issue which should be reviewed by this Court.

The courts below have incorrectly interpreted the above entitled actions as being against judges who have acted within the scope of their duties.

The decisions in these cases have gone beyond the bounds of conscience and propriety, where the defendant judge Pihl lied under oath, and dared Mrs. Baker to argue with him. The judge refused to allow Mr. Baker to intervene and to testify as to the truth and the law in the matter.

There has never been a finding affirmed by this Court, that a state judge could violate the criminal code of his state, while keeping within the scope of his duties. The defendants in these cases are sworn to uphold the laws and constitution of the State of Oregon, as well as the Constitution of the United States.

In *BROWN v. DUNNE (7th Cir CA 1969) 409 F2d 341,343*, the court refused to take jurisdiction over a civil rights action in a probate matter, but they referred to their remand of *SPIRES v. BOTTORFF (7th Cir CA 1963) 317 F2d 273-74-75*, where the ground was that the defendant judge was

not, under the allegations, performing judicial function so as to be immune.

In the instant case, the defendant judge was able to act under color of law by reliance upon his own perjury which, petitioners submit, is outside of his judicial scope, and beyond the Oregon State Legislature's intent.

In *UNITED STATES v. CLASSIC, 313 U.S. 299,326,* this Court said, "misuse of power, possessed by virtue of state law - - - is action taken 'under color of' state law".

However, the instant case does not carry the stigma of misuse, but of illegal use of state power, which petitioners submit, is a deprivation of Due Process of Law.

This Court in *SCREWS v. UNITED STATES 325 U.S. 91,111* clearly said, "- - - that under 'color' of law means under 'pretence' of law. Thus acts of officers in the ambit of their personal persuits are plainly excluded". Petitioners submit that the above quotation means, as applied to the instant case, a judge may exercise discretion, and even be wrong, but he may not willfully and knowingly commit a crime to achieve his own personal goal.

II STATE PECEDENT PROVIDES SOUND RULES OF LAW

The case which petitioners basically rely upon, *"ALDERMAN v. TILLAMOOK COUNTY, 50 Or 48, 91 Pac 298(1907)"*, is a case in point of judicial prejudice, and is a case in point as to the relief available. The difference rests in the property contract, and the fact that judge Pihl swore to a false affidavit, rather than asking an attorney friend to lie, as the judge did in *"ALDERMAN"*.

The courts below did not follow the standards which were set by the Oregon Supreme Court in *"ALDERMAN"*, and they have left the false impression that perjury, by a judge in a judicial proceeding, is perfectly within the Due Process Standards of the United States Fourteenth Amendment.

Or where the court in *"Alderman"*, said an executor should not be required to appear in a prejudiced probate court.

"ALDERMAN", established the judicial precedent, and ORS 115.155 established the legislative intent that, a probate judge has no jurisdiction to hold summary hearings,

without consent of the executor, although, the executor may be removed on the basis of the probate'court's own affidavit, if a just cause exists. Why should the probate judge think that his false affidavit could be any more efficacious than, say, an affidavit on the size of the executor's shoes?

III COURTS BELOW LACK POWER TO FIND FACT WITHOUT HEARING

The court below arrived at a conclusion of law,,in opposition to unopposed allegations, which is not in accord with opinions of this Court. The honorable Circuit Court Judges, Hufstedler, Sneed, and Kennedy, of the court below are not empowered with fact finding functions on an appeal. The United States District Court for the District of Oregon, which *BAKER v. PIHL* was appealed from did not provide a hearing for the allegations, which precludes any finding other than those facts in the pleadings.

SEE: *CHESSMAN v. TEETS,*
350 U.S. 3,4, 76 SCt 34,
And; 354 U.S. 156,164-65, 77 SCt 1127

The courts below are only too willing to find fact, where none exist; to look to rule of law, where none applies; to settle issues, where nothing can be settled, without a fact-finding trial which will prescribe the applicable law, and define the adjudicable issues to be resolved.

CONCLUSION

For these reasons, and others already presented in our petition for certiorari, we respectfully submit that this Court should grant certiorari in these cases.

Edna I. Baker Roger L. Baker
PETITIONERS IN THE ABOVE ENTITLED CAUSES
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Ph:649-1897 Aloha, Or 97005

UNITED STATES OF AMERICA]
STATE OF OREGON]ss. AFFIDAVIT
COUNTY OF MULTNOMAH] OF VERACITY

We, EDNA I. BAKER and ROGER L. BAKER, being first duly sworn, depose and say: that we are citizens of the UNITED STATES, over the age of 21 years, and competent to be witnesses in this cause; that all facts and allegations in the above SUPPLEMENT are true, as stated by petitioners, and that the above actions are well founded in law.

PETITIONER Edna I. Baker

PETITIONER Roger L. Baker

UNITED STATES OF AMERICA]
STATE OF OREGON]ss.
COUNTY OF MULTNOMAH]

BE IT REMEMBERED, that on this_____day of February 1977, before me, the undersigned, a Notary Public in and for the said county and state, personally appeared the within named affiants known to me to be the identical individuals described in and who executed the within instrument and acknowledged to me that they executed the same freely and voluntarily.

IN THE TESTIMONY WHEREOF, I have hereunto set my hand and affirmed my official seal the day and year last above written.

NOTARY PUBLIC FOR OREGON

My Commission expires.....

Notary Seal

APPENDIX

Or Rev Stat § 162.065:

Perjury. (1) A person commits a crime of perjury if he makes a false sworn statement in regard to a material issue, knowing it to be false.

(2) Perjury is a Class C felony.

[1971 c.743s.184]